HH 76-03
HC 5666/2000
PETER NHEKEDE
and
ZIMNAT LION INSURANCE COMPANY (PVT) LTD
and
DZINGIRAI JAIROS
and
JOSEPH AND SONS (PVT) LTD

Civil trial

HIGH COURT OF ZIMBABWE
MUNGWIRA J.
HARARE, 18,19 February, 20 March, 7 October, 2002 and 14 May, 2003

Mrs *M A Nyoni* for the Plaintiff
Mr *J Dondo* for the Defendant

MUNGWIRA J: The plaintiff was on 10th May 1999 a fare paying passenger in a bus, registration no. 458 – 192, belonging to the third defendant and driven by its employee the 2nd defendant which bus was involved in an accident at the 92,5 kilometre peg along the Harare Masvingo Road when a tyre burst and the vehicle left the road and hit a tree.

At the material time the 1st defendant was the insurer of the 3rd defendant.

The plaintiff avers that the cause of the accident is solely attributable to the negligence of the second defendant in that the second defendant was negligent in one or more of the following particulars; -

a) He failed to keep proper control of the vehicle
b) He drove at an excessive speed of at least between 130 to 150 km/hr whereas the maximum speed limit was 80km/hr.
c) He drove an unroadworthy vehicle. Despite being told that a tyre was smelling and about to burst by the plaintiff and other

passengers in the bus 2nd defendant recklessly went on with the journey without stopping the vehicle for a proper check up on the defective tyre.

d) He failed to stop the vehicle when the prospects of an accident were imminent.

The plaintiff claims that as a result of the accident he sustained the following bodily injuries:

a) He broke his right collar bone
b) His brain tumour was offset
c) He suffered cuts on the head
d) He injured his left ear as a result of glass fragments which permanently damaged his ear drum

He makes the averment that due to his injuries :

a) He can no longer run or do active work
b) He is now temperamental and has lost the love of his family and children
c) He suffers from urinary incontinence
d) He is sexually dysfunctional
e) He suffers from impaired hearing and requires a hearing aid
f) his temper is volatile and he has lost his sense of balance

He states that he was before the accident employed as a charge hand by Olivine Industries (Pvt) Ltd earning a monthly wage of $ 4 699, 88.The injuries have according to plaintiff reduced to nil his prospects of promotion as he is no longer physically and mentally fit. His employer has, he says, retained him in employment on humanitarian grounds. In his calculation the span of his working life has been reduced by more than 10 years.

He thus claims as damages a total of $605 000,00 which is made up as

follows:

a) hospital expenses $65 000, 00
b) future medical expenses $60 000,00
c) loss of past income $120 000,00
d) pain and suffering $180 000,00
e) loss of amenities of life $100 000,00
f) loss of future earnings $80 000,00

The trial proceeded against only the 2nd and 3rd defendants as the 1st defendant had settled its statutory liability to the plaintiff and had no further part to play in the proceedings

The issues for determination were as follows:

i) Whether or not the accident was caused by the negligence of the 2nd defendant?
ii) Whether or not the 2nd defendant was driving an unroadworthy vehicle at the relevant time?
iii) What injuries, pain and suffering were suffered by the plaintiff as a result of the accident?
iv) What medical expenses plaintiff incurred as a result of the accident?
v) What future medical expenses the plaintiff will incur as a result of the accident?

The 3rd defendant made the following admissions;

a) that the plaintiff was injured while travelling as a passenger in its bus in the accident that occurred on 10 May 199
b) that the 2nd defendant was driving the bus on that day within the terms of and scope of his employment.

The plaintiff's evidence was that he boarded the bus at his rural home in Manyere, Chivhu. When the bus stopped at Chivhu passengers complained to the driver that he was driving at an excessive speed and

that his vehicle's tyres were worn. The driver had in response

undertaken to drive at a safe speed.

The driver had after departing from Chivhu however continued to drive at an unsafe speed which had caused several passengers to voice their concerns. The plaintiff had gone to the extent of registering a complaint with the bus conductor about the smell of burning rubber which seemed to be emanating from the tyres. The driver had not taken kindly to the request that he stop and check his tyres but had don e so under protest. The conductor had disembarked while the driver remained at the steering wheel. The stop was very brief. As the driver took off he was waving his hands in the air and hurled insults at the passengers informing them that the bus was his responsibility and he would not brook any interference.
Further complaints were made to the conductor about the smell of rubber and at that stage the bus wobbling and making 'funny noises' who agreed that there was need for something to be done. The next that happened was that there was a 'cracking' noise followed by the bus veering off the road and colliding into a tree.
The plaintiff had succeeded in extricating himself from the wreckage whereafter he had rendered assistance to other passengers and the driver who were trapped in the bus. He had at that stage probably been suffering from shock and had experienced a bout of dizziness. The exigencies of the situation had overidden his own personal needs.
At Chivhu hospital he had told the medical personnel that his head was 'sort of floating' and this had been put down to shock and would clear. He was treated for a broken collarbone, the left leg and the head before being discharged on the same day and given seven days off duty.

After the accident he had experienced chronic headaches and

problems with his left ear resulting in several visits to the clinic. In June

1999 he had been referred to Harare Hospital where tests revealed the

presence of a brain tumour. A successful operation had been carried out

by a neurosurgeon, a Mr. Muchenagumbo.

> After the surgery he had to undergo a course of radiotherapy and physiotherapy.
> Examination of his ear had shown that the eardrum had been damaged by fragments of broken glass and the doctor had

prescribed an ear aid.
A medical assessment had been carried out at the time of the pre-trial conference by a Dr Mhere.
The plaintiff testified to having been in good health prior to the accident. He stated that he had been with his current employer for 11 years. He had been appointed to the position of quality controller in 1996, a position he still held to date. Asked as to what he was referring to when he spoke of loss of income he said his extra income generating activities such as welding scotchcarts and procurement and sale of agricultural produce had been affected. When questioned as to whether these activities had been curtailed because of the accident or the tumour he stated that the topic of the tumour had been debated and exhausted.
He had enjoyed playing football, a sport which involved physical contact. He had once sustained a fracture to his leg when playing football but the leg had fully healed When probed about his football days he stated that there were records at Marondera hospital which dated back to his days at Kushinga Phikeklela college in 1981-1982.He did not make reference to a more recent date on which he had participated in football. When the scar on his head was from the operation and he had minor scars on the nose and right index fingers from the accident.
He had suffered from a great deal of stress and experienced a lack of libido and faecal and urinary incontinence particularly when travelling on public transport. This was a source of continuous embarrassment and humiliation to him. His temper had also been adversely affected and he tended to be quarrelsome. He in addition claimed to suffer from poor memory.
He walked with the aid of a stick due to weakness in his left leg.
The defendant's counsel put it to the plaintiff that he had approached the managing director of the 3rd defendant about a week after the accident demanding to be compensated for his medical expenses and that he had been walking normally without a limp or he aid of a stick. The plaintiff admitted that he had made such visit but denied that he was walking normally.

He estimated that his hospital expenditure was in the region of $65

000 and produced a printout as at 25 January 2001from his medical aid company CIMAS as Exhibit 2.The amount was he said constantly rising. He had been subjected to psychological therapy to assist him in dealing with the matter of incontinence and had been diagnosed as having been suffering from post-traumatic stress disorder. He was unable to give an estimate of future medical expenses. He had last received treatment in 2001.

It was drawn to his attention that the CIMAS schedule of expenses, Exhibit 2, dealt only with expenses incurred in respect of treatment received for the tumour with none of the expenses being related to injuries sustained in the accident he agreed that that was the case but that added that sight should not be lost of what it is that had triggered the brain tumour.

The plaintiff did not dispute that the tumour which was large and occupied almost the whole of the right hemisphere of his brain had been lying dormant for some time and was in situ before the accident. He became annoyed when the defence suggested that the areas of physical impairment to which he had made reference were attributable to the brain tumour and not the accident and reminded defence counsel that it was after all the accident which had triggered the symptoms which had caused the tumour to be discovered and that but for the accident he might have continued to live as normal.

The defendant disputed that plaintiff sustained a broken collar bone and alleged that the Chivhu medical records reflected only bruising and Betadine treatment. The plaintiff's response was that the defence counsel was trying to mislead the court as there was a report by a doctor at Chivhu who had assessed disability at 5%. The defence countered that no such assessment had been made. The plaintiff was unable to point out where the doctor had recorded that finding when afforded the opportunity to examine his medical records.

His opinion as to the cause of the accident was that the driver was speeding, the bus was unroadworthy not in the mechanical sense but in that the tyres were worn, with another possible factor being the driver's anger which would have the effect of distorting rationality. He estimated the speed of the bus as having been between 120-130km/hr. This was a mere guess on his part as he had been seated immediately behind the

driver and had observed that the speedometer was not working although he later changed this portion of his evidence to read that he was unable to comment as to the state of the speedometer. The witness indicated that although he was not a driver he was able to judge if the speed at which a vehicle was travelling was safe or unsafe. The condition of the bus in general had been good save for the tyres. The other members of the crew had been civil and wellmannered.
Issue was taken with the mention for the first time in court of the fact that the driver had stopped the bus once before the accident and at the 107,5 km peg in order to check for the source of the smell of rubber. It was put to the witness that the only times that the bus stopped was for the purpose of setting down passengers.
The police had attended the scene of the accident but had not interviewed any of the passengers. The witness was when cross-examined unable to dispute that the tyre which had burst had been subjected to forensic examination. All he could say was that he was not in a position to confirm whether or not the police took the right tyre for examination.

When put to him that the 3rd defendant had been advised by the police that the tyre had been found to have been in perfect order he again said that he could not comment as he had not seen the tyre surrendered for examination. He was however unwilling to speculate although he did go as far as to suggest that the police are notorious for their corruptibility.

It was the defendant's contention that about five months after the accident plaintiff attempted to influence some of the other passengers to institute claims for damages against the bus company. This the plaintiff did not deny. His explanation was that it was not a crime to want to help others especially those who were disadvantaged because of ignorance or poverty. He proceeded to point out an elderly gentleman who was seated in court who he said had had his ear torn off and had sustained a scalp

injury in the accident.

He was challenged on this aspect with the defence alleging that according to available evidence all the passengers taken to the hospital had been discharged after receiving treatment for minor injuries except for one elderly lady. The old man had not according to the defendants been a passenger on the bus, not a passenger on the bus.
The second witness for the plaintiff was Mapiye Mugariri, the elderly man. He was, he says, a passenger on the bus on the fateful day. He described the bus as having been speeding and to the passengers having cried out to the driver to stop after they had detected a smell. The driver had only heeded the call after some distance but had taken off again shortly after stopping .The accident had occurred before the bus had covered a substantial distance. The witness stated that he lost consciousness but recalls that the vehicle collided into three mass trees. He had been admitted to Chivhu hospital and had later been transferred to Harare for skin grafting. He had sustained injury to his eye, ear, leg and forehead,
His grandson who had been travelling with him had assisted him in obtaining compensation from an insurance company.
Under cross-examination the witness stated that he had come to know the plaintiff after the plaintiff had approached him in connection with the case. The plaintiff had requested the witness to testify on his behalf. Asked if the plaintiff was known to him before then he stated that he had known the plaintiff from youth.
The witness said that he had not seen the plaintiff on the day of the accident and that the plaintiff could have been aware of his presence on the bus as his injuries were not as severe.

The 3rd witness was the neurosurgeon, Doctor Muchenagumbo, a medical practitioner with over 27 years of experience. It is he who discovered that the plaintiff was suffering from a brain tumour which he described as a lesion extending from the front to the middle and back of almost the whole of the right side of the brain. He had monitored the plaintiff's condition until 19 September 1999 when he performed brain surgery. Thereafter the plaintiff had been treated with painkillers,

steroids and sedatives. He also underwent physiotherapy as the left side of his body was paralysed. This treatment was followed up with regular visits to the doctor's rooms and radiotherapy.

The results of histopathological examination revealed that the brain tumour was of a type referred to as meningioma the cause of which was unknown. It was however known that this type of tumour could be caused by trauma to the head although this would rarely happen within a period as brief as 2 months. In his opinion the tumour was there before the accident. He referred to this as the type of case which his profession referred to as a red herring where symptoms such as experienced by the plaintiff could present after an accident and would be considered as being accident related whereas the cause would be the brain tumour. The doctor was only prepared to go so far as to say that the accident could have disturbed the balance within the skull and tipped the scale in a brain which had been tolerating the tumour. The tumour would however manifested sooner or later and to use the doctor's words, "only the Lord could tell". He was in short only prepared to say with certainty that the accident contributed to the manifestation of the tumour.

The symptoms experienced by the plaintiff could in the doctor's opinion be attributable to the presence of the tumour and the trauma to the brain was a contributory as opposed to a causative factor. In other words the accident did not cause the tumour but brought the problem to

the fore.

He had only seen the plaintiff some 2 months after the accident and was thus unable to comment on whether he sustained bruises or lacerations. The plaintiff continued to suffer from weakness to the left side and had at some stage walked into the doctor's rooms using a stick and dragging his left foot. The patient had also reported deteriorating memory function, sexual dysfunction and had evinced signs of urinary incontinence.
An initial assessment of disability had placed the extent of disability at 38% but a subsequent examination in July 2002 had resulted in the figure being revised upward to 55%.The plaintiff's mental capacity and agility had been affected. The plaintiff was likely to incur future medical expenses for physiotherapy, sedatives and painkillers and he would require medication to boost his sexual function.
The doctor indicated that he had no reason not to trust information furnished to him by a patient. The patient's wife had confirmed the complaint of incontinence and sexual dysfunction. He had conducted tests which verified the weakness in the left leg. It had not been brought to his attention that the patient had previously sustained a fracture to his leg.
At the conclusion of the plaintiff's case an application was made for absolution from the instance. I dismissed the application.
The defendant called two witnesses, the bus conductor, Vincent Majaji and the defendant's managing director Chenjerai Mudyiwa.

The 3rd defendant's managing director gave evidence to the effect that after receiving a report that one of his company's buses had been involved in an accident he telephoned the police at Featherstone. Upon arrival at the scene of the accident he found two police officers guarding the wreckage. He proceeded to Chivhu hospital after these officers had advised him that the passengers had been ferried to Chivhu hospital. He had enquired of the hospital personnel as to the condition of the passengers and had been informed that all had been attended to and discharged.

The accident had been caused by a front tyre burst.

The witness disputed that the tyre in question had been defective as the tyre had been examined by the police and Vehicle Inspection department. The tyre had been taken by the police at Featherstone to Police General Headquarters where tests had been conducted with the outcome having been that the tyre was new and in good condition. No prosecution had ensued.
The witness denied any suggestion of impropriety or corruption on his part or that of the police.
He himself was a driver and a mechanic. To his knowledge new tyres could burst if they were not properly manufactured.

He had seen the plaintiff who was in the company of four others including the plaintiff's second witness .He had observed that this man had a healed scar on his forehead and disagreed that this man had been hospitalised for a month as he had seen him five days to a week after the accident. All these persons were claiming that they had been injured in the accident. He had advised them to obtain documentation from the police which they were to submit to the 3rd defendant's insurers. He had not observed any or been shown any injuries on any of these persons.

Vincent Majaji stated that he was the bus conductor on the day of the accident. His evidence was totally at variance with that of the plaintiff on all the important aspects of the case. His evidence was that the bus had not been full at the time of the accident. He disputed that the driver had driven at a speed which had caused the plaintiff and other passengers to voice their complaints. He had not noted the smell of rubber and there had been no discussion with any passenger about the

condition of the bus. The bus had stopped only twice between Chivhu

and the scene of the accident to allow passengers to disembark.

He had been sitting in the first seat to the front of the bus when he heard the sound of the tyre bursting. The bus had then veered off the road for a distance of about 7-8 metres before it came into contact with a tree. There were other smaller trees in the vicinity. At the time the bus was in his estimation travelling at no more than 80km/hr. He commented that after Featherstone and before a bridge there was a police patrol vehicle which was lying in wait for speeding buses.
He had after the accident made his way out of the bus followed by the plaintiff with whose assistance he rendered aid to the remaining passengers some of whom were panicking whilst some appeared confused and others remained calm. The witness and the plaintiff had made a joint effort to extract the driver from the wreck but had failed. The police had after they arrived at the scene queried the cause of the accident and both he and the plaintiff had given their respective accounts. The police had also enquired into the number of casualties and had gone to the extent of ascertaining the witness, state in addition to asking him whether the company money was secure.
He stated that he had not noted any injuries on the plaintiff.
He remarked that when the accident occurred the only person with whom he was familiar was the plaintiff and he because of that particularly happy that the plaintiff had escaped unscathed.
He had remained at the scene until the last person had been ferried to the hospital. Upon arrival at the hospital he had been examined and given a clean bill of health. The plaintiff had been at the hospital. Whilst at the hospital he had enquired if to whether anyone had sustained serious injuries and had been assured that there were no serious injuries.
The witness stated that he had not seen the plaintiff's second witness at the scene. Further to that he had not heard anything about him or the injuries he allegedly sustained. There had only been one old lady who had been injured in the leg and was transferred to Beatrice Hospital.
He had left the hospital in the company of the plaintiff .The two had proceeded to the local bus terminus. The plaintiff had asked him as to what was to happen to him as he had paid his fare to Harare and the witness had made arrangements with a conductor for another bus belonging to the same company for the plaintiff to be ferried at no additional fare, he had boarded the same bus as plaintiff and plaintiff had disembarked along the way
He had next seen the plaintiff some two months later. The two had exchanged casual greetings, he had not observed any physical

abnormality on the plaintiff.
He disagreed with the plaintiff's evidence that the tyre which burst was worn, his testimony being that the tyre had been on the bus for barely a week.
When cross-examined the witness said that he was not in a position to dispute the plaintiff's evidence that the driver had at some stage his hand out of the window.
There is a grave disparity in the parties' versions as to the circumstances of the occurrence of the accident and much rests on this courts finding as to credibility. Granted the plaintiff was involved in the accident on the day in question and as such sympathy is due. I did however gain a strong and distinct impression that he was not entirely honest with the court. For the most part of his testimony he was given to a great deal of grandstanding.
If he did indeed sustain the wounds and broken collarbone there is in my view no earthly reason why there is no hard evidence in the form of medical records to substantiate his assertions. A broken collarbone cannot be considered to be a minor injury such as might have been easily overlooked or ignored by the medical authorities.
The plaintiff in my view tended to overplay his hand.

I have little reason to disbelieve the defendant's two witnesses as to their observations as regards both the plaintiff and his witness. The evidence of the 3rd defendant's managing director was that he saw the plaintiff and his witness at the company offices within a week of the date of the accident. That evidence was not rebutted. If that is the case then it follows that the plaintiff's witness could not have been detained in hospital for a month. One can in fact take the argument further and say that if he had indeed sustained the extensive injuries it would be fair, and this without need for reference to a medical expert, to say the plaintiff's witness would have been in no state to be gadding about from office to office seeking compensation within a period of a week after the

occurrence. The truth therefore can only lie in that his was a deliberate falsehood.

The conductor was in my assessment a more credible witness. The evidence of the conductor makes straightforward and uncomplicated reading and is to be preferred over that of the plaintiff.

Contrary to the plaintiff's statement that the police did not speak to any of the passengers it would appear from the police report filed as Exhibit 3 that the police did indeed record the number of passengers injured and did record the names of some of those passengers and their particulars. The question poses itself as to what the probability would have been of the police failing to prefer a prosecution if the versions of the named persons were in line with that of the plaintiff given the allegations of what would if proven have amounted to gross negligence. The likelihood in my view is that these persons did not support the plaintiff's story. This on its own would to me suggest that events did not occur as described by the plaintiff.

The evidence of the managing director was, as was the conductor's, simple and unembellished and any suggestion of collusion with the police is without foundation and has not been taken beyond the realms of speculation.

Over and beyond the issue of credibility there is another hurdle which the plaintiff has failed to surmount and that is in that the medical evidence is that the tumour was present before the accident. The evidence of the doctor is such that one can conclude that the tumour can account for all of the symptoms although one cannot rule out that the occurrence of the accident could have logically accelerated the symptoms of the pre-existing neurological disease. In short it has not been proven that the accident was the cause of the symptoms.

In the circumstances the plaintiff has failed to establish the defendants' liability. In the result the plaintiff's claim is dismissed with costs.

Madzivanzira & Partners, plaintiff's legal practitioners
Atherstone & Cook, lst defendant's legal practitioners
Chinamasa, Mudimu & Chinogwenya, 2nd and 3rd defendant's legal practitioners